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No. 10-1051

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC.,
Petitioner,

v.

MAURIZIO ANTONINETTI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Chipotle Mexican Grill, Inc., states that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONER

In case after case, the courts of appeals have disagreed over whether the fact that a statute *authorizes* injunctive relief reduces or eliminates a plaintiff's burden of showing that the traditional equitable criteria favor an injunction. In the decision below, the Ninth Circuit cemented its position in that debate, holding that the district court *must* enter an injunction in this case—despite the district court's findings that respondent had neither a sincere nor a concrete desire to return to Chipotle's restaurants—because Title III's authorization of injunctive relief at least *reduces* a plaintiff's equitable burden.

Respondent does not dispute the importance of the conflict—either to the ADA or to the wide array of other statutes it implicates. See Pet. 22-24. Nor does he make any serious effort to defend the rule the Ninth Circuit

actually applied. Instead, he invokes the Ninth Circuit's statement that it was not deciding whether Title III *eliminates* a plaintiff's equitable burden entirely. But that disclaimer is irrelevant. The Ninth Circuit clearly held that Title III's authorization of injunctive relief at least *reduces* a plaintiff's burden. That holding alone confirms the conflict between the Ninth Circuit (among others) and the many circuits holding that mere authorization of injunctive relief does not alter a plaintiff's burden unless Congress takes the further step of *mandating* injunctive relief.

Respondent's efforts to avoid review on the second question likewise fail. The Ninth Circuit held that respondent had shown irreparable harm based solely on a stipulation that he "wants *to be able to have* the 'Chipotle experience.'" Pet. App. 15a (emphasis added). That ruling conflicts with this Court's holding in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that vague "some day" intentions to return are not sufficient. Respondent's waiver argument and invocation of his self-serving testimony that he would return "tomorrow" had he not been deterred are both unavailing. The waiver argument is meritless. And the district court specifically found the cited testimony *not credible*—which is why the Ninth Circuit nowhere relied on it. The Ninth Circuit's departure from *Lujan* was thus dispositive. It independently warrants review.

I. The Circuits Are Divided Over Whether A Statute's Express Authorization Of Injunctive Relief Reduces Or Eliminates A Plaintiff's Burden

The Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits have all held that a statutory provision authorizing (but not mandating) injunctive relief does not

reduce or eliminate a plaintiff's burden to show that the equitable factors favor an injunction. Pet. 16-17. But the Sixth, Ninth, Tenth, and Eleventh Circuits follow the opposite rule—that "'[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.'" Pet. 18-20.

A. Notwithstanding that clear conflict, respondent insists that all the cases are reconcilable because courts "uniformly apply *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)" to decide "whether the four-factor criteria apply, or whether the statute requires a mandatory injunction." Br. in Opp. 4, 20-24. Not so.

Some circuits follow the rule that the traditional standards govern unless Congress has affirmatively *mandated* injunctive relief. See Pet. 16-17; Br. in Opp. 21-22. That approach is consistent with *Romero-Barcelo*'s directive that courts must examine whether a particular statute "'in so many words, or by a necessary and inescapable inference, *restricts* the court's jurisdiction in equity'" by *mandating* an injunction. 456 U.S. at 313 (emphasis added). That is the standard Chipotle advocates here. Pet. 24-25.[1]

Other circuits, however, follow a different rule—that a statute's mere *authorization* of injunctive relief justifies departure from traditional standards. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, 640 F.2d 255 (10th Cir. 1981), for example, the Tenth Circuit held that "'[w]here an injunction is *authorized* by statute it is un-

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[1] Respondent accuses Chipotle (at 24) of seeking to "overturn[ ]" *Romero-Barcelo* in favor of a rule that "the four-part traditional test is always required" even where a statute mandates injunctive relief. The petition nowhere argues for such a rule. To the contrary, it expressly relies on the *Romero-Barcelo* framework. Pet. 24-25.

necessary for plaintiff to plead and prove the existence of the usual equitable grounds.'" *Id.* at 260 (emphasis added). Respondent claims (at 22-23) that *Lennen* is "consistent with *Romero-Barcelo*," but plainly it is not: Mere *authorization* of injunctive relief does not prove Congress intended to *mandate* such relief.

Lennen is not alone. The Sixth, Ninth, and Eleventh Circuits have all similarly held that mere statutory authorization of injunctive relief reduces or eliminates a plaintiff's traditional burden. See Pet. 19-22 (citing *CSX Transp., Inc.* v. *Tenn. State Bd. of Equalization*, 964 F.2d 548, 550-551 (6th Cir. 1992); *Gresham* v. *Windrush Partners, Ltd.*, 730 F.2d 1417, 1423-1424 (11th Cir. 1984); *Trailer Train Co.* v. *State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983); *Burlington N. R.R. Co.* v. *Dep't of Revenue*, 934 F.2d 1064, 1074-1075 (9th Cir. 1991); and *Silver Sage Partners, Ltd.* v. *City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001)). Those decisions likewise cannot be dismissed as "consistent with *Romero-Barcelo*." Br. in Opp. 22-23. Not one cites *Romero-Barcelo* or makes any effort to determine whether the statutory text *mandates* an injunction "'in so many words, or by a necessary and inescapable inference.'" 456 U.S. at 313. Instead, they all rely on *Lennen* and its progeny to hold that a statute's mere *authorization* of injunctive relief displaces traditional standards.[2]

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[2] Respondent cites *United States* v. *Marine Shale Processors*, 81 F.3d 1329 (5th Cir. 1996), for the proposition that "[e]ven the so-called 'traditional standards' permit injunctions without findings of irreparable harm and other elements." Br. in Opp. 23-24. But *Marine Shale* was addressing specific situations, such as suits by sovereigns, where the usual standards traditionally do not apply. Respondent points to no traditional exception applicable here.

Respondent's claim (at 17) that the conflict "pre-dates the modern enunciation of the test" in *Romero-Barcelo* similarly fails. Aside from *Lennen* itself, every one of the foregoing cases post-dates *Romero-Barcelo*. Respondent's complaint (at 16-17) about the petition's purported "disfigur[ation]" of *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), thus proves nothing. While the D.C. Circuit singled out the Tenth Circuit's pre-*Romero-Barcelo* decision in *Lennen* in identifying the conflict, the Sixth, Ninth, and Eleventh Circuits have all continued to follow *Lennen* even after *Romero-Barcelo*, as the cases cited above (at 4) and in the petition (at 19-22) make clear. The cases on the other side of the conflict post-date *Romero-Barcelo* too. Pet. 16-17. The D.C. Circuit's observation that a conflict exists (the only point for which the case was cited) thus is no less true today.

The circuits are also divided in the specific context of the ADA. Pet. 18. Respondent asserts that the cited cases "do not analyze, discuss or involve the question of standards for an injunction." Br. in Opp. 23 n.43. To the contrary, both specifically address the applicable standard and conclude that the traditional equitable standard applies. See *Bercovitch* v. *Baldwin Sch., Inc.*, 133 F.3d 141, 151-156 (1st Cir. 1998); *Doe* v. *Nat'l Bd. of Med. Examiners*, 199 F.3d 146, 154-158 (3d Cir. 1999). Those cases cannot be reconciled with the Ninth Circuit's departure from that traditional standard here.

B. Respondent asserts that this case does not properly present the conflict because the Ninth Circuit "emphatically and explicitly did not decide" the issue. Br. in Opp. 3-4, 12-13. But the only question the Ninth Circuit purported not to decide was whether a statute's authorization of injunctive relief *eliminates* a plaintiff's equitable burden entirely—in other words, whether Title III

ever "authorizes a district court to deny injunctive relief after finding a violation of the Act." Pet. App. 15a. The Ninth Circuit clearly held that authorization at least *reduces* a plaintiff's burden; respondent does not contend otherwise. The Ninth Circuit relied on "the fact that an injunction is the only relief available to a private party under the Act" as a factor weighing heavily—here, dispositively—in favor of an injunction. *Ibid.* And it quoted its earlier holdings that "'[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.'" *Id.* at 16a. That holding alone—that mere authorization of injunctive relief *reduces* the plaintiff's burden—puts the Ninth Circuit in conflict with the many circuits holding that traditional standards govern unless Congress *mandates* injunctive relief.

In any event, the Ninth Circuit's disclaimer was a fig leaf. In ordering an injunction, the *only* factors the court relied on were its finding that the ADA had been violated, the statute's provision for injunctive relief, and the existence of other "circumstances" that the court, tellingly, never identified. Pet. App. 15a. The Ninth Circuit never addressed two of the equitable factors the district court relied on: the public interest and the balance of hardships. *Id.* at 90a.[3] And the court of appeals' irreparable-harm analysis—added belatedly on rehearing—rests on a stipulation so devoid of content that it could not possibly *compel* an exercise of the district court's discretion under traditional standards.

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[3] Respondent asserts that Chipotle "waived" any cost defense. Br. in Opp. 11 & n.29. But the district court did not see things that way; it expressly considered the issue. See Pet. App. 90a.

C. Respondent also errs in claiming that review would be premature or advisory because an injunction might not be necessary after all. Br. in Opp. 14-15. The Ninth Circuit expressly held that "it would be an abuse of discretion for the district court now to deny injunctive relief." Pet. App. 15a. And the district court declared on remand that, changed circumstances notwithstanding, "for the Court to properly follow the Ninth Circuit opinion, an appropriate measure must be in place to ensure that Chipotle's food preparation counters remain permanently in compliance with this law"—*rejecting* Chipotle's argument that its voluntary compliance mooted the case. Br. in Opp. App. 2a-3a. Although the district court did suggest at one point that some other "measure" short of an injunction might suffice, *id.* at 3a; but cf. Pet. App. 13a (injunction the "sole remedy" under Title III), the very fact that coercive relief remains a live issue before the district court means that the propriety of the Ninth Circuit's decision ordering such relief is properly before this Court.

Nor does it matter that the precise contours of any remedy have yet to be defined. Chipotle's position throughout has been that respondent is not entitled to an injunction *at all* because he cannot meet the traditional criteria; the Ninth Circuit held otherwise based on its conclusion that Title III's authorization of injunctive relief reduces the plaintiff's burden. Nothing about the contours of the ultimate remedy sheds any light on those legal issues. "[T]he interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Gressman *et al.*, *Supreme Court Practice* 282 (9th ed. 2007).

That is precisely the case here. If this Court rules that the Ninth Circuit erred because traditional standards govern, further proceedings on the *contours* of an injunction will likely prove unnecessary.

D. On the merits, respondent does not defend the *Lennen* standard the Ninth Circuit actually applied. Instead, he argues in a footnote (at 26-27 n.45) that Title III injunctions are mandatory even under *Romero-Barcelo*. But those merits arguments only underscore the need for review.

Respondent first urges that the ADA states that "new construction *shall* comply" with its standards and thus "provide[s] a *mandate* for the elimination of discrimination." Br. in Opp. 26 n.45. But the question is whether an *injunction* is mandatory, not whether the *law* is mandatory. Virtually all laws are mandatory. Respondent thus urges *Romero-Barcelo*'s evisceration, not its application.

Respondent's invocation (at 26-27 n.45) of one paragraph of legislative history, and an administrative guide citing it, is equally unavailing. That report notes that, under 42 U.S.C. §12188(a)(2), injunctions must include facilities-modification orders. It does not state that injunctions are mandatory in all cases. See H.R. Rep. No. 101-485(IV), at 63-64 (1990). And one paragraph of legislative history cannot establish the "'clear and valid legislative command'" necessary to justify abandoning traditional equitable standards. *Romero-Barcelo*, 456 U.S. at 313; see *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

II. The Ninth Circuit's Departure From *Lujan* Also Warrants Review

The Ninth Circuit's decision also defies *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). The Ninth Cir-

cuit held that respondent had shown irreparable harm based solely on a stipulation that he "wants *to be able to have* the 'Chipotle experience.'" Pet. App. 15a (emphasis added). That decision conflicts with *Lujan*'s holding that mere "'some day' intentions" to return to a place, "without any description of concrete plans," are not enough. 504 U.S. at 564.

A. Respondent urges (at 13-14) that this issue was "not properly raised" below because his standing was challenged for the first time on rehearing. But the Ninth Circuit added the disputed language to its opinion *in response to* the rehearing petition. See Pet. App. 2a, 15a. It cannot be that holdings adopted by an appellate court *after* rehearing are unreviewable. The settled rule is that, so long as the court of appeals actually passes on an issue, the time when the petitioner first raised it is irrelevant. See *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991).

Respondent's further contention (at 13) that the court below did not "decide the *Lujan* question" lacks merit. The challenged language was added in response to Chipotle's *Lujan*-based rehearing petition. And while the court analyzed the issue in terms of irreparable harm rather than standing, the rubric is immaterial. As already explained, Pet. 28 n.6, if a plaintiff cannot even show Article III standing to seek an injunction, *a fortiori* he cannot show the irreparable harm necessary under the traditional equitable standard.

B. Respondent offers practically no defense of the Ninth Circuit's holdings. He barely mentions the holding that courts may not attach any meaningful weight to a plaintiff's serial-litigant status in evaluating the sincerity of a professed desire to return. Respondent insists that

"serial litigation is an accepted mechanism for securing one's civil rights." Br. in Opp. 34. But he never explains why courts should be prohibited (or even discouraged) from relying on that status when making credibility determinations to which it is plainly relevant—particularly where a plaintiff has sued dozens or hundreds of businesses in the past and could not possibly plan to return to them all. The very fact that serial litigation is an "accepted" (*i.e.*, widespread) tactic underscores the need for this Court's guidance.

Respondent's attempted defense of the Ninth Circuit's reliance on his stipulation—that he "wants to be able to have the 'Chipotle experience,'" Pet. App. 15a—fares even worse. Respondent's assertion (at 31) that "a plaintiff need not show 'imminent' injury if he or she has suffered 'actual' injury" is flatly contrary to *Lujan*. "'"Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief * * * if unaccompanied by any continuing, present adverse effects."'" *Lujan*, 504 U.S. at 564 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)). Past harm may suffice for damages. But absent some threat of future injury, there is nothing for an injunction to remedy.

Respondent also claims that *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), supersedes *Lujan*'s "concrete plans" requirement where a plaintiff claims he is "deterred" from going to a location. Br. in Opp. 32. But that is not what *Laidlaw* held. And the Ninth Circuit's rationale had nothing to do with deterrence. The court held that respondent could seek an injunction because, per the stipulation, he "wants to be able to have the 'Chipotle experience.'" Pet. App. 15a. That is, at best, precisely the sort of "some day" intention that *Lujan* addressed and found wanting.

Indeed, it is not even that, because it is simply an abstract desire to have *the ability* to do something at some unspecified future date.[4]

Respondent similarly errs in invoking his testimony that he would return to the restaurants "tomorrow" if he were not deterred. Br. in Opp. 10, 32-33. The district court found that testimony *not credible* and respondent's professed intent to return *insincere*. Pet. App. 87a. The Ninth Circuit never relied on respondent's discredited testimony, instead resting its holding solely on the stipulation. *Id.* at 15a. Respondent cannot avoid review based on testimony the Ninth Circuit never invoked and the district court found insincere. While respondent alleges (at 6 n.5) a variety of other "misstatements" in the petition, they too rest on refusals to accept the district court's findings and the Ninth Circuit's actual rationale.[5]

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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[4] Respondent's assertion (at 32 & n.50) that "[t]here is no dispute that he wanted to return" is false. Chipotle has contended throughout that the "evidence presented at trial supported the District Court's finding that Antoninetti's purported desire to return to the Restaurants was insincere." C.A. Br. 71.

[5] Respondent quibbles (at 9 n.22) with the statement that he "indicated he was 'satisfied with the service he had received,'" Pet. 8, pointing out that it rests on an employee's testimony about what he had indicated. But the district court credited that testimony and adopted it as a finding of fact. Pet. App. 75a-77a. Likewise, respondent's reference (at 10) to "numerous complaints from customers in wheelchairs" (six nationwide over four years, C.A. E.R. II-15 at 59-64) does not undermine the district court's finding that no such complaints were ever made about *these* restaurants. Pet. App. 90a.

Respectfully submitted.

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